Supreme Court, U.S.
FILED
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

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LINDA C. HOWARD,

v.

MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

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DAVID L. SMITH,

Petitioner.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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DAVID L. SMITH

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## QUESTIONS PRESENTED FOR REVIEW

Whether by refusing to address the issues raised and argued by Mr. Smith in his appellate briefs, the Tenth Circuit violated his First Amendment right to access to the courts to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision under 28 U.S.C. § 1291.

Whether by enjoining Mr. Smith from proceeding as an appellant, or as a petitioner in an original proceeding, without the representation of a licensed attorney admitted to practice in the Tenth Circuit, unless he first obtains permission to proceed pro se, the Tenth Circuit further violated his First and Fifth Amendment rights.

Whether the Tenth Circuit also violated Mr. Smith's Sixth Amendment right to self-representation, including his right to proceed pro se under 28 U.S.C. § 1654.

Whether the record was devoid of any evidence upon which the Tenth Circuit could base imposing its injunction against Mr. Smith.

Whether by charging Mr. Smith with violating the Tenth Circuit's previous orders, the Tenth Circuit was charging him with what amounted to criminal contempt; and he was therefore entitled to a full criminal process, including his Sixth Amendment right to a trial by jury on these charges.

Whether at the very least, Mr. Smith was entitled to an evidentiary hearing at which he would have the opportunity to present expert testimony and other relevant evidence on his affirmative defenses and mitigating circumstances to the charges being brought against him.

Whether the Tenth Circuit committed reversible error by denying Mr. Smith's request for an evidentiary hearing.

Whether since the Tenth Circuit has demonstrated that it is incapable of rendering a fair and impartial decision with respect to any matter involving Mr. Smith, the Tenth Circuit also committed reversible error by denying his request for the cases under review to be transferred to the United States Court of Appeals for the Federal Circuit for decision.

Whether the Tenth Circuit committed reversible error by denying Mr. Smith's request for an order dismissing with prejudice the frivolous and groundless charges it brought against him for the improper purpose of depriving him of his First and Fifth Amendment rights to litigate meritorious issues the Tenth Circuit and the District Court have steadfastly refused to decide on their merits.

Whether the Tenth Circuit committed reversible error by issuing a false and defamatory opinion that is unsupported by the law or the facts.

Whether the United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; or has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

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## JURISDICTION

The opinion sought to be reviewed was entered by the United States Court of Appeals for the Tenth Circuit on June 29, 1998. Rehearing of this opinion was summarily denied by order dated July 14, 1998.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on writ of certiorari the Tenth Circuit's opinion of June 29, 1998 is 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Amendment I of the Constitution of the United States provides in relevant part as follows:

> Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.

Amendment V of the Constitution of the United States provides in relevant part as follows:

> . . . [N]or shall any person be . . . deprived of life, liberty or property, without due process of law . . . .

Amendment VI of the Constitution of the United States provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

28 U.S.C. § 455(a) provides as follows:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 1291 provides as follows:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this Title [28 U.S.C. §§ 1292(c), (d), 1295].

28 U.S.C. § 1654 provides as follows:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

28 U.S.C. § 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Pro se attorney-petitioner David L. Smith ("Mr. Smith") hereby files his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit:

## I. STATEMENT OF THE CASE

On June 29, 1998, the United States Court of Appeals for the Tenth Circuit issued its opinion denying Mr. Smith's appeals in two federal civil rights cases without addressing the issues raised and argued by him in his appellate briefs.[1] The Tenth Circuit then enjoined Mr. Smith from proceeding as an appellant, or as a petitioner in an original proceeding, without the representation of a licensed attorney admitted to practice in the Tenth Circuit, unless he first obtains permission to proceed pro se. The Tenth Circuit gave Mr. Smith ten days from the date of its opinion to file written objections, limited to fifteen pages, to these proposed filing restrictions.

On July 14, 1998, the Tenth Circuit issued its order summarily denying Mr. Smith's Petition for Rehearing, Suggestion for Rehearing En Banc, and Objections to Prospective Filing

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[1]Mr. Smith's appellate briefs are reproduced in the appendix to this petition for a writ of certiorari at pages A-21 through A-73.

Restrictions and Injunction.[2]

## II. ARGUMENT

In its (June 29, 1998) opinion, the Tenth Circuit found and concluded that by filing and pursuing his appeals, Mr. Smith was attempting to re-litigate issues already determined by the Tenth Circuit or foreclosed by previous determinations of the Tenth Circuit, in violation of orders issued by the Tenth Circuit in previous cases. However, the issues raised and argued by Mr. Smith in these previous cases were different from those raised and argued by him in the cases under review. The parties were also different. In at least four of these previous cases, the standard or burden of proof was different.[3] In all

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[2]Mr. Smith's petition, suggestion and objections are reproduced in the appendix to this petition for a writ of certiorari at pages A-74 through A-92.

[3]See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994); In re David L. Smith, 76 F.3d 335 (10th Cir.), cert. denied, ____ U.S. ____, 117 S.Ct. 186, 136 L.Ed.2d 125 (1996); In the Matter of David L. Smith, Nos. 95-1091 and 95-1119 (10th Cir.), cert. denied, ____ U.S. ____, 117 S.Ct. 359, 136

of these previous cases, the Tenth Circuit refused to address the issues raised and argued by Mr. Smith--a blatant and egregious violation of his First Amendment right to access to the courts to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision under 28 U.S.C. § 1291. See Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); Salve Regina College v. Russell, 499 U.S. 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("the obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations"); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); United States v. Jose, 519 U.S. 54, 117 S.Ct. 463, 136 L.Ed.2d 364 (1996) ("finality, not ripeness, is the doctrine governing appeals from District Court to Circuit Court"); Brewen v. United States, 375 F.2d 285 (5th Cir. 1967); Matter of McLinn, 739 F.2d 1395 (9th Cir. 1984)

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L.Ed.2d 251 (1996); Smith v. United States Court of Appeals for the Tenth Circuit, et al., No. 98-1030 (10th Cir.), cert. pending in Supreme Court No. 98-265.

("every party is entitled to a full, considered, and impartial review of the decision of the trial court"); Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3rd Cir. 1988); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Steiner Corp. v. Johnson & Higgins of California, 135 F.3d 684 (10th Cir. 1997). Nor did the Tenth Circuit give any independent reasons for its decisions. See id. The Tenth Circuit merely affirmed the orders issued by the United States District Court for the District of Colorado, which also refused to address the issues raised and argued by Mr. Smith--another blatant and egregious violation of his First and Fifth Amendment rights. See id.; see also NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v.

Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("a public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Dailey v. Vought Aircraft Company, 141 F.3d 224 (5th Cir. 1998). Therefore, by filing and pursuing his appeals, Mr. Smith was not attempting to re-litigate issues already determined by the Tenth Circuit or foreclosed by previous determinations of the Tenth Circuit, in violation of orders issued by

the Tenth Circuit in previous cases.[4] Instead, Mr. Smith was attempting to litigate meritorious issues that the Tenth Circuit and the District Court have steadfastly refused to decide on their merits.[5] By refusing to address these issues in its (June 29, 1998) opinion, the Tenth Circuit again deprived Mr.

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[4]In other words, Mr. Smith was not attempting to litigate issues barred by the doctrines of res judicata and collateral estoppel, which have no application where the appellant did not have a full and fair opportunity to litigate his federal claims. See Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

[5]Since the issues Mr. Smith was attempting to litigate were well grounded in fact and were warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, or to establish new law, the Tenth Circuit's charge that these issues were "frivolous" was false. See McKnight v. General Motors Corporation, 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's attorney was that his argument was foreclosed by circuit precedent).

Smith of his First and Fifth Amendment rights.

By enjoining Mr. Smith from proceeding as an appellant, or as a petitioner in an original proceeding, without the representation of a licensed attorney admitted to practice in the Tenth Circuit, unless he first obtains permission to proceed pro se, the Tenth Circuit not only further violated his First and Fifth Amendment rights. See id. The Tenth Circuit also violated Mr. Smith's Sixth Amendment right to self-representation, including his right to proceed pro se under 28 U.S.C. § 1654. See McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); Devine v. Indian River County School Board, 121 F.3d 576 (11th Cir. 1997). It should also be recognized that the record was devoid of any evidence upon which the Tenth Circuit could base imposing its injunction against Mr. Smith.

The Tenth Circuit gave Mr. Smith ten days from the date of its opinion to file written objections, limited to fifteen pages, to its proposed filing restrictions. However, by charging Mr. Smith with violating the Tenth Circuit's previous orders, the Tenth Circuit was charging him with what amounted to criminal contempt; and he was therefore entitled to a full criminal process,

including his Sixth Amendment right to a trial by jury on these charges.[6] See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed.2d 797 (1911); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (attorney disciplinary proceedings are quasi-criminal in nature); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). At the very least, Mr. Smith was entitled to an evidentiary hearing at which he would have the opportunity to present expert

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[6]As a matter of the equal protection of the laws, Mr. Smith should not have fewer constitutional rights merely because the Tenth Circuit brought charges against him sua sponte rather than in an order to show cause why he should not be held in contempt for allegedly violating the Tenth Circuit's previous orders. See Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); Bodie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

testimony and other relevant evidence on his affirmative defenses and mitigating circumstances to the charges being brought against him. See Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Dailey v. Vought Aircraft Company, 141 F.3d 224 (5th Cir. 1998). Under these circumstances, the Tenth Circuit committed reversible error by denying Mr. Smith's request for an evidentiary hearing.

Since the Tenth Circuit has demonstrated that it is incapable of rendering a fair and impartial decision with respect to any matter involving Mr. Smith, the Tenth circuit also committed reversible error by denying his request for the cases under review to be transferred to the United States Court of Appeals for the Federal Circuit for decision.[7] See 28 U.S.C. § 455(a);

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[7]Mr. Smith is a member in good standing of the bar of the Federal

Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decision-maker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decision-maker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed.2d 11 (1954) (nor may a judge or other ostensibly impartial decision-maker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). Further, the Tenth Circuit committed reversible error by denying Mr. Smith's request for an order dismissing with prejudice the frivolous and groundless charges it brought against him for the improper purpose of depriving him

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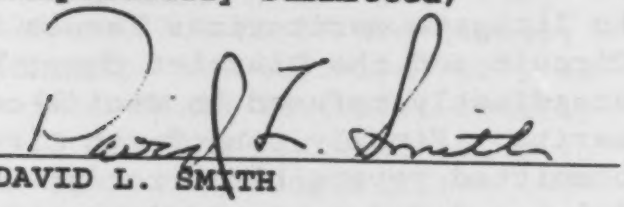
Circuit, and he believes that the judges of the Federal Circuit could have and would have rendered a fair and impartial decision in the cases under review.

of his First and Fifth Amendment rights to litigate meritorious issues the Tenth Circuit and the District Court have steadfastly refused to decide on their merits. Finally, the Tenth Circuit committed reversible error by issuing a false and defamatory opinion that is unsupported by the law or the facts.

Under the foregoing circumstances, the United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Mr. Smith therefore requests this Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and such other and further relief as may be just under the circumstances, including an order under 28 U.S.C. § 2106 reversing and vacating the Tenth Circuit's (June 29, 1998) opinion.

Respectfully submitted,



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PRO SE ATTORNEY-PETITIONER

# APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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LINDA C. HOWARD,

Plaintiff,

v.

No. 97-1297

MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Defendants-Appellees,

---

DAVID L. SMITH,

Attorney-Appellant.

---

JAMES EDWARD QUALLS,

Plaintiff,

v.

No. 97-1392

REGIONAL TRANSPORTATION DISTRICT; RICHARD BAUMAN ROBERT GARSIDE; RICHARD REYNOLDS; ELLSWORTH WALKER; and JAMES MISEK,

Defendants-Appellees.

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DAVID L. SMITH

Attorney-Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. Nos. 93-D-1895 & 91-Z-989)

---

Submitted on the briefs:

David L. Smith, Pro se
Attorney-Appellant.

Brian M. Mumaugh, Jeffrey T. Johnson, of Holland & Hart, Denver, Colorado, for Defendants-Appellees Mail-Well Envelope Co., Butler Paper Co., and Georgia Pacific Corp., and Randall A. Constantine, of Elrod & Thompson,

Atlanta, Georgia, for Great Northern Nekoosa Corporation Employee Protection Plan.

Dana N. Mumey, Associate General Counsel, and Erica A. Weber, Assistant General Counsel, Regional Transportation District, Denver, Colorado, for Defendant-Appellee Regional Transportation District.

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Before BALDOCK, EBEL, and MURPHY.

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PER CURIAM.

Attorney-appellant David L. Smith appeals from adverse decisions in two separate district court proceedings in which he served for a time as plaintiff's counsel. Because these appeals concern interrelated orders and similar issues, the hearing panel has combined them for disposition.[8] We also announce, with the full participation of the en banc court,

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[8] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

general restrictions on Mr. Smith's future appellate filings based on his history of repetitive, meritless litigation in this court.

These appeals may be put in perspective with some factual and procedural background common to both. Much of the information particularly relevant to these proceedings is recited in prior related decisions of this court. See generally Howard v. Mail-Well Envelope Co., 90 F.3d 433 (10th Cir. 1996); Qualls v. Regional Transp. Dist., Nos. 95-1385, 95-1459, 95-1489, 1996 WL 412414 (10th Cir. July 23, 1996). A broader discussion of Mr. Smith's litigious history in this court is included in the last section of this opinion, relating to the proposed filing restrictions.

Mr. Smith was suspended from practice before this court in November of 1993. Thereafter, the district judge entered orders in both of these cases staying proceedings pending a determination of his practice status in the United States District Court for the District of Colorado. Mr. Smith immediately appealed from the stay orders, but this court dismissed his

interlocutory appeals for lack of jurisdiction, awarded appellate sanctions to appellees, and remanded for a determination of an appropriate amount.

In the meantime, Mr. Smith was suspended from practice in the district court. Consequently, the district judge lifted the extant stays, acknowledged that Mr. Smith was no longer authorized to appear as counsel, and directed the plaintiffs to secure new legal representation or notify the court of their intention to prosecute their cases pro se. Mr. Smith immediately appealed again, challenging these actions as well as various sanctions imposed against him. These interlocutory appeals were also dismissed for lack of jurisdiction.[9]

Ultimately, the parties settled their differences by written stipulation,



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[9] Eventually Mr. Smith did secure appellate review of certain orders issued in Qualls v. Regional Transportation District, D.C. No. 91-Z-989, by repeatedly filing notices of appeal, some of which were received, properly, after entry of final judgment in the case. See Qualls 1996 WL 412414, at **1.

and the district court entered judgments of dismissal in both cases. Mr. Smith, who personally takes issue with these stipulated dispositions, subsequently filed the instant appeals. Further details relating to the proceedings are included in the discussion of each appeal below.

I

In Howard v. Mail-Well Envelope Company, No. 97-1297, Mr. Smith directly appeals from the district court's judgment dismissing the case pursuant to the parties' stipulation following his withdrawal as plaintiff's counsel. Mr. Smith raises a host of issues. Some of these he lacks standing to assert, many more are simply redundant, and all are, ultimately, meritless,

First of all, as a general matter, Mr. Smith argues that the district court lacked jurisdiction to enter any of the challenged orders after he had taken two interlocutory appeals to this court in the case. It is axiomatic that an effective notice of appeal transfers jurisdiction from the district court to the court of appeals. See Stewart v. Donges, 915 F.2d 572, 575 (10th Cir.

1990). However, there are pertinent limitations on this transfer of jurisdiction.

First, no transfer occurs if the appeal is taken from a nonappealable order. See United States v. 397.51 Acres of Land, 692 F.2d 688, 693 (10th Cir. 1982); Riggs v. Scrivner, Inc., 927 F.2d 1146, 1148 (10th Cir. 991); see also Stewart, 915 F.2d at 575 (noting transfer of jurisdiction by appeal "from true final judgment or from a decision within the collateral order exception"). Second, the transfer affects only those aspects of the case involved in the appeal. See Stewart, 915 F.2d at 575. Thus, when an appeal is taken from a limited interlocutory ruling, as opposed to one that affects the litigation as a whole, the district court may proceed with the case. Compare Colorado v. Idarado Mining Co., 916 F.2d 1486, 1490 & n.2 (10th Cir. 990), with Stewart, 915 F.2d at 576. Conversely, even a general appeal does not divest the district court of jurisdiction over peripheral, collateral matters such as attorneys' fees. See, Stewart, 915 F.2d at 575 n.3 (following Garcia v. Burlington N. R.R., 818 F.2d 713, 721 (10th Cir. 1987)).

It is evident from a review of the interlocutory appeals cited by Mr. Smith that these exceptions to the jurisdictional rule he relies on are clearly operative here. As the district court has already explained, the cited appeals challenged matters that were of limited scope relative to the litigation as a whole and were, in any event, not immediately appealable--indeed, this court has already confirmed the latter conclusion by its disposition of the appeals. See Howard, 90 F.3d at 435-37 (dismissing appeal No. 95-1428 for lack of an appealable order, and noting previous jurisdictional dismissal of Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. Nov. 15, 1994)). Thus, the district court properly proceeded with the case.

Turning now to more specific objections, Mr. Smith contends that by disqualifying him, the district court deprived the plaintiff of her First and Seventh Amendment rights. However, Mr. Smith has standing to raise only issues which concern his own personal interests; grievances he perceives and attributes to a former client are not properly within the scope of this appeal. Compare Uselton v. Commercial Lovelace Motor

Freight, Inc., 9 F.3d 849, 854-55 (10th Cir. 1993) (attorney cannot personally appeal orders applicable only to party), with Riggs, 927 F.2d at 1149 (attorney may appeal orders issued directly against him). Mr. Smith's next claim, that the parties' stipulation and the judgment entered thereon deprived him of the benefit of attorneys' fees under 42 U.S.C. § 1988, suffers from a related standing deficiency:

> The Supreme Court has made it clear that, in general, statutes bestow fees upon parties, not upon attorneys. Those fees can, therefore, be waived by the party himself. As the Court has said, "just as we have recognized that it is the party's entitlement to receive the fees in the appropriate case, so have we recognized that as far as [42 U.S.C. § 1988] is concerned, it is the party's right to waive, settle, or negotiate that eligibility." Thus, the attorney remains at the mercy of the client, who can either demand attorneys' fees from the defendant, or not as he chooses. If the client chooses not to ask for the fees, the attorney has no standing to request them.

United States ex rel. Virani v. Jerry M. Lewis Truck Parts & EquiR., Inc., 89 F.3d 574, 577 (9th Cir. 1996) (citations omitted; alteration in original); see Benitez v. Collazo-Collazo, 888 F.2d 930, 933 (1st Cir. 1989) ("The 'prevailing party' language [of § 1988] makes it patently obvious that it is the prevailing party, not the party's counsel, who is entitled to be awarded fees[,]" and, hence, "only the party, and not the attorney, has standing to appeal any such grant or denial."); see also Uselton, 9 F.3d at 854-55 (citing "client's entitlement to attorneys' fees from opposing party" as example of order client, but not counsel, may appeal).

Under these same principles, Mr. Smith may challenge the sanctions imposed against him. See, e.g., Riggs, 927 F.2d at 1149. However, his objections to the legal basis for sanction is precluded by this court's prior decision directing the district court to take such punitive action. See Howard, 90 F.3d at 435. Thus, the only sanction issue before us at this point is whether the district court's calculation of the amount was proper. See id. Mr. Smith's argument in this regard that the district court's reliance on the defendants' application

and supporting documentation was somehow improper--when he had filed no objection to these materials--is meritless.

Mr. Smith also complains that he was not given an adequate opportunity to be heard with respect to his disqualification as plaintiff's counsel. Given his formal suspension from practice necessitating the disqualification, this objection is frivolous. Similarly meritless is his completely unsubstantiated accusation of bias on the part of the trial judge.

As noted at the outset, Mr. Smith raises a host of overlapping, repetitious, and conclusory objections. Whether or not each has been expressly included in the above discussion, we have considered all of the issues raised in this appeal and have concluded that Mr. Smith is not entitled to any relief.

Defendants have requested that they be dismissed from further proceedings in this case, asserting that they "have no interest in the outcome of this appeal by Smith." Defendants' Br. at 2. As Mr. Smith's appeal involves a sanction payable to defendants, who have not formally settled or released the

obligation, we deny their request, but hereby direct that they need not respond to any further filings herein absent an order from this court.

II

In Qualls v. Regional Transportation District, No. 97-1392, Mr. Smith appeals from the district court's denial of a Fed. R. Civ. P. 60(b) motion he filed on his own behalf. As described above, the district court entered judgment on stipulation of the parties at a time when, due to professional discipline, Mr. Smith no longer represented the plaintiff. Notwithstanding this formal dissociation from the case, Mr. Smith later attempted, unsuccessfully, to challenge the judgment under Rule 60(b). We review the district court's decision solely for abuse of discretion, see Stubblefield v. Windsor Capital Group, 74 F.3d 990, 994 (10th Cir.1996), and affirm.

There is no need to delve into detail here. Although appealing from the denial of his Rule 60(b) motion, Mr. Smith devotes a substantial portion of his brief to rehashing complaints about his previous sanctions, disqualification,

and discipline. (Indeed, the argument actually directed at the Rule 60(b) ruling is so perfunctory that he never even discusses the substantive basis for the motion.) Much of what we have already said above, and decided in Qualls v. Regional Transportation District, Nos. 95-1385, 95-1459, 95-1489, 1996 WL 412414 (10th Cir. July 23, 1996), applies also to these stale and conclusory objections. Mr. Smith has clearly not demonstrated any abuse of the district court's discretion. Furthermore, we note that his Rule 60(b) motion was patently out of time. The cause of action was dismissed with prejudice on October 10, 1995, but Mr. Smith did not file his motion until September 26, 1997. Nothing he has argued on appeal would justify invocation of those grounds in Rule 60(b)(4) - (6) which permit filing beyond the one-year deadline otherwise imposed by the Rule. For the foregoing reasons, the judgments of the United States District Court for the District of Colorado are AFFIRMED.

**Prospective Filing Restrictions**

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**Before SEYMOUR, Chief Judge, PORFILIO, ANDERSON, TACHA,BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO, and MURPHY, Circuit Judges.**

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Mr. Smith has a long history with this court marred by repetitive, frivolous filings and general abuse of the judicial process. This well-documented course of misconduct began during his tenure as a practicing attorney, prompting the imposition of numerous monetary sanctions, his suspension from Tenth Circuit practice, and ultimately his disbarment by this court.[10] See generally In re David L. Smith, 76 F.3d 335 (10th Cir. 1996) (ordering disbarment); In re David L. Smith, 10 F.3d 723 (10th Cir. 1993) (ordering suspension); DeHerrera v. City & County of Denver ex rel. Bd. of Water Commrs, Nos. 93-1070, 93-1139, 1993 WL



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[10] The United States Supreme Court has also disbarred Mr. Smith, See In re Disbarment of David L. Smith, 516 U.S. 984, 116 S. Ct. 510 (1995).

359691 (10th Cir. Sept. 3, 1993) (imposing monetary sanction); Casillan v. Regional Transp. Dist. Amalgamated Transit Union, Local 1001, Nos. 92-1009, 92-1039, 1993 WL 8732 (10th Cir. Jan. 5, 1993) (same). While such disciplinary steps have curtailed Mr. Smith's professional misfeasance, they do not address his similar abuse of the judicial process as a litigant in his own right.

Since his suspension and disbarment, Mr. Smith has pressed on as a litigant with the same pattern of meritless, repetitive litigation that led to his professional censure. Jurisdictional dismissals and summary affirmances in this regard, often in successive appeals from the same litigation which prompted his professional discipline, have become commonplace. See, e.g., Howard, 90 F.3d 433; Qualls, Nos. 95-1385, 95-1459, 95-14899 1996 WL 412414; DeHerrera v. City & County of Denver ex rel. Bd. of Water Comm'rs, No. 95-1110, 1996 WL 316473 (10th Cir. June 12, 1996); Casillan v. Regional Transp. Dist., No. 93-1158, 1993 WL 521053 (10th Cir. Dec. 14, 1993). Further, Mr. Smith's pro se filings have involved the same substantive redundancy as his professional efforts. See, e.g., Dunkin

v. Louisiana-Pacific Corp., No. 96-1411, 1997 WL 447327 (10th Cir. July 28, 1997), cert. denied, 118 S. Ct. 884 (1998); Dunkin v. Louisiana-Pacific Corp., No. 95-1087, 1996 WL 316467 (10th Cir. June 12, 1996); In re David L. Smith, Nos. 95-1119, 95-1091, 1996 WL 67191 (10th Cir. Feb. 16, 1996). This court has on previous occasions warned Mr. Smith that his continued engagement in repetitious pro se litigation could lead to additional personal sanctions. See, e.g., Saathoff v. Filenet Corp., No. 95-1206, 1996 WL 294211 (10th Cir. June 4, 1996); In re David L. Smith, 1996 WL 67191. Indeed, a panel of this court has already ordered the clerk not to accept any more successive filings by Mr. Smith contesting his disbarment. See Smith v. United States District Court, No. 98-1030 (Orders filed April 9 and May 13, 1998).

Evidently, neither professional discipline nor personal sanction has impressed upon Mr. Smith the essential underlying problem. Initially as counsel, and now as pro se litigant, he has engaged in a pattern of litigation activity which is manifestly abusive" and thereby "strained the resources of this court." Winslow v. Hunter (In re Winslow), 17 F.3d 314, 315 (10th Cir.

1994) (quotation omitted). Accordingly, "based on [Mr. Smith's] appellate filings history and abuse of the appellate process, we have sua sponte decided to impose restrictions on [his] future filings in this court commensurate with our inherent power to enter orders necessary and appropriate in aid of our jurisdiction under [28 U.S.C.] § 1651." Werner v. Utah, 32 F.3d 1446, 1448 (10th Cir. 1994) (quotations omitted); see also Cauthon v. Rogers, 116 F.3d 1334, 1337 (10th Cir. 1997); Schlicher v. Thomas, 111 F.3d 777, 780-81 (10th Cir. 1997).

Mr. Smith is hereby enjoined from proceeding as an appellant, or as a petitioner in an original proceeding, without the representation of a licensed attorney admitted to practice in this court, unless he first obtains permission to proceed pro se. To do so, he must take the following steps:

1. File a petition with the clerk of this court requesting leave to file a pro se proceeding;

2. Include in the petition the following information:

a. A list, by case name, number, and citation where applicable, of all proceedings currently pending or filed previously in this court, with a statement indicating the nature of his involvement in, and the current status or disposition of, each proceeding;

b. A list, by case name, number, and citation where applicable, of all assessments of attorneys' fees, costs, or other monetary sanction against him arising out of any federal court matter, with a brief explanation of the circumstances surrounding each assessment and a statement apprising this court whether and when the assessment was paid;

c. A list, by case name, number, and citation where applicable, of all outstanding injunctions, contempt orders, or other judicial directions limiting his access to any state or federal court, including injunctions, orders, or other directions requiring him to be represented by an attorney or seek leave to file matters pro se.

3. File with the clerk a notarized affidavit, in proper legal form, which recites the issues he seeks to present, including a particularized description of

the order or ruling being challenged and a short statement of the legal basis asserted for the challenge. The affidavit must also certify, to the best of his knowledge, that the legal arguments advanced are not frivolous or made in bad faith; that they are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; that the appeal or other proceeding is not interposed for any improper purpose; and that he will comply with all federal appellate rules and local rules of this court.

These documents shall be submitted to the clerk of the court, who shall forward them to the chief judge for review to determine whether to permit the pro se appeal or other proceeding. Without the chief judge's approval, the matter will not proceed. If the chief judge approves the submission, an order will be entered indicating that the matter shall proceed in accordance with the Federal Rules of Appellate Procedure and the Tenth Circuit Rules. Only at that juncture will the appeal or other proceeding formally be filed in this court.

Mr. Smith shall have ten days from the date of this opinion to file written objections, limited to fifteen pages, to these proposed restrictions. Unless this court orders otherwise upon review of any objections, the restrictions shall take effect thirty days from the date of this opinion and shall apply to any matter filed by Mr. Smith with this court after that time.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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LINDA C. HOWARD,

Plaintiff,

v. No. 97-1297

MAIL-WELL ENVELOPE COMPANY,
BUTLER PAPER COMPANY,
GEORGIA-PACIFIC CORPORATION,
GREAT NORTHERN NEKOOSA
CORPORATION EMPLOYEE
PROTECTION PLAN,

Defendants-Appellees,

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DAVID L. SMITH,

Attorney - Appellant.

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ORDER

Filed July 14, 1998

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Before BALDOCK, EBEL, and MURPHY, Circuit Judges.

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David L. Smith's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

The filing restrictions announced by the en banc court in our prior opinion shall take effect immediately upon entry of this order.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: [Fred Garcia]
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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LINDA C. HOWARD,

Plaintiff,

v.

No. 97-1297
(D.C. No. 93-D-1895
(Dist. of Colo.)

MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Defendants-Appellees.

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DAVID L. SMITH,

Attorney-Appellant.

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# OPENING BRIEF FOR PRO SE ATTORNEY-APPELLANT DAVID L. SMITH

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Attorney-appellant David L. Smith ("Mr. Smith") hereby files his opening brief:

## I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction of the United States District Court for the District of Colorado is based on 28 U.S.C. §§ 1331 and 1343, 29 U.S.C. §§ 621-634 and 1001 et seq., and 42 U.S.C. §§ 1981, 1981a and 2000e et seq.

Appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit is based on 28 U.S.C. § 1291.

## II. ISSUES PRESENTED FOR REVIEW

Whether by issuing their orders of June 17, 1994, May 15, 1995, July 21, 1995, September 7, 1995, October 6, 1995, January 22, 1996, August 4, 1997 and August 11, 1997, Judges Weinshienk and Daniel disqualified Mr. Smith from further representation of the plaintiff for allegedly violating the Colorado Rules of Professional Conduct.

Whether since these orders rested on grounds that could (and did) harm Mr. Smith's professional reputation, settlement of the underlying case did not preclude appellate review of these orders, which exceeded the scope of the District Court disciplinary panel's disciplinary order of February 10, 1995.

Whether by issuing their orders disqualifying Mr. Smith from representing his client in accordance with the terms of their contingent fee agreement, Judges Weinshienk and Daniel deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living.

Whether since these orders were issued without affording Mr. Smith proper notice, or an opportunity to file a brief or otherwise be heard before entry of a final judgment, Judges Weinshienk and Daniel deprived him of his Fifth Amendment right to due process of law.

Whether this disqualification of counsel also deprived the plaintiff, who was financially unable to hire substitute counsel, and was incompetent to proceed pro se, of her First Amendment right to pursue federal civil rights litigation.

Whether as the direct and proximate result of this constitutional deprivation, the plaintiff was forced to forego her Seventh Amendment right to a jury trial and settle her case at beneath nuisance value.

Whether an attorney has standing to appeal the denial of attorney fees.

Whether by issuing his orders of August 4, 1997 and August 11, 1997, dismissing plaintiff's federal civil rights case with prejudice, each party to bear her or its own costs and attorney fees, Judge Daniel denied the attorney fees he was required to award pursuant to 42 U.S.C. § 1988.

Whether since these orders deprived Mr. Smith of his property interests created by his contingent fee agreement with the plaintiff, he has standing to seek appellate review of these orders.

Whether Judge Weinshienk's perfunctory statement that "[n]o objections were filed to defendants' application" and "[t]he Court has reviewed defendants' application and supporting documentation and finds the request reasonable," is clearly insufficient as a meaningful judicial decision under Article III of the Constitution of the United States.

Whether this statement is also insufficient to give proper notice as to whether the standards for imposing sanctions set forth in Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) have been followed for purposes of review on appeal.

Whether Mr. Smith's conduct in filing an immediate appeal of Judge Weinshienk's order of June 17, 1994 manifested an intentional or a reckless disregard of his duties to the Court.

Whether Mr. Smith's appeal presented colorable claims based on the facts and law at issue, as required by White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990).

Whether Judge Weinshienk imposed harsh and unjustified sanctions of $8,640.00 against Mr. Smith for the improper purpose of driving him out of federal civil rights practice and chilling (or freezing) federal civil rights litigation in general.

Whether by refusing to rule on plaintiff's and Mr. Smith's request for proper notice, an opportunity to file a brief and a hearing after the Tenth Circuit had disposed of their appeal in this case (including their petition for rehearing and suggestion for rehearing en banc), and had issued its mandate pursuant to Fed. R. App. P. 41(a), Judge Weinshienk deprived them of their Fifth Amendment right to due process of law.

Whether Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice.

Whether the filing of a timely and sufficient notice of appeal immediately transfers jurisdiction of all matters relating to the appeal from the district court to the court of appeals, and divests the district court of authority to proceed further with respect to such matters, except in aid of jurisdiction.

Whether when Judges Weinshienk and Daniel issued their orders of May 15, 1995, July 21, 1995, September 7, 1995, October 6, 1995, and January 22, 1996, this case was still on appeal to the Tenth Circuit, which had exclusive jurisdiction over the case.

Whether Judges Weinshienk and Daniel were proceeding without or in excess of their jurisdiction.

Whether under all the circumstances, it was reasonably questionable whether Judges Weinshienk and Daniel could be fair and impartial decisionmakers in this case, or in any case involving Mr. Smith.

Whether Judges Weinshienk and Daniel were obligated by 28 U.S.C. § 455(a) and Canon 3 of the ABA Code of Judicial Conduct to disqualify themselves from this case.

Whether by failing or refusing to disqualify themselves from this case, Judges Weinshienk and Daniel deprived Mr. Smith of his Fifth Amendment due process right to a fair and impartial decisionmaker.

Whether Judges Weinshienk and Daniel also engaged in a pattern of judicial misconduct, in violation of 28 U.S.C. § 372(c).

## III. STATEMENT OF THE CASE

On June 17, 1994, United States District Judge Zita L. Weinshienk issued her order staying plaintiff's federal civil rights case "until final action is taken on the Committee on Conduct's recommendation concerning plaintiff's counsel's status," and vacating the jury trial scheduled to commence on August 1, 1994. (R. Vol. I., Doc. 38, all pages and lines.) Judge Weinshienk's reference to "the Committee on Conduct's recommendation concerning plaintiff's counsel's status" was a reference to the recommendation made by the Committee on Conduct of the United States District Court for the District of Colorado to the three-judge (including Judge Weinshienk) disciplinary panel of that Court that Mr.

Smith be indefinitely suspended from the practice of law in that Court based on the order issued on November 29, 1993 by the three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit. In its order of November 29, 1993, the Tenth Circuit disciplinary panel indefinitely suspended Mr. Smith from the practice of law in the Tenth Circuit for filing alleged "frivolous" appeals from the District Court to the Tenth Circuit in four federal civil rights cases,[11] and for failing to comply with court orders to pay more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the District Court (including Judge Weinshienk) and the Tenth Circuit,[12] all

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[11]Mr. Smith denies that the appeals he filed from the District Court to the Tenth Circuit were "frivolous," and requests a hearing at which he would have the opportunity to present expert testimony and other relevant evidence on this issue. No such hearing was held by the Tenth Circuit disciplinary panel before indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit, in violation of Fed. R. App. P. 46 and his Fifth Amendment right to due process of law.

[12]Mr. Smith was (and is) financially unable to pay the more than $50,000.00 in

in alleged violation of the Colorado Rules of Professional Conduct.[13] See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the District Court and the Tenth Circuit has been "satisfied."[14] See id.

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harsh and unjustified sanctions previously imposed against him by the District Court (including Judge Weinshienk) and the Tenth Circuit. Mr. Smith is therefore being excluded from the practice of law in the Tenth Circuit on an impermissible basis, i.e., on the basis of his inability to pay more than $50,000.00 in harsh and unjustified sanctions.

[13]Mr. Smith denies that he violated the Colorado Rules of Professional Conduct.

[14]Mr. Smith has previously submitted information to the Tenth Circuit disciplinary panel showing that he was financially unable to "satisfy" each sanction order of the District Court and the Tenth Circuit.

On May 15, 1995, Judge Weinshienk issued her minute order announcing that "plaintiff shall have until June 15, 1995, to secure new counsel in this case or notify the Court that she will represent herself in this matter"; that "Defendant's Motion to Lift Stay and Set Status Conference is granted, and the stay in this case shall be lifted on June 15, 1995"; and that "a status conference in this case will be set shortly after new counsel enters on behalf of plaintiff." (R. Vol. I., Doc. 45, all pages and lines.) This order was issued "in light of the fact that David L. Smith is no longer authorized to practice law in the United States District Court for the District of Colorado." (Id.) Judge Weinshienk's reference to "the fact that David L. Smith is no longer authorized to practice law in the United States District Court for the District of Colorado" was a reference to the fact that on February 10, 1995, the District Court disciplinary panel (including Judge Weinshienk) issued its disciplinary order indefinitely suspending Mr. Smith from the practice of law in the District Court based on the order issued on November 29, 1993 by the Tenth Circuit disciplinary

panel. Mr. Smith may apply for reinstatement to the District Court bar when he can demonstrate that each sanction order of the District Court and the Tenth Circuit has been "satisfied."[15]

On July 21, 1995, Judge Weinshienk issued her amended minute order acknowledging the fact that her minute order of May 15, 1995 had not been mailed to plaintiff, and announcing that "plaintiff shall have until August 15, 1995, to secure new counsel in this case or notify the Court that she will represent herself in this matter"; that "the stay in this case shall be lifted on August 15, 1995"; and that "a status



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[15]Mr. Smith has previously submitted information to the District Court disciplinary panel (including Judge Weinshienk) showing that he was financially unable to "satisfy" each sanction order of the District Court and the Tenth Circuit. Mr. Smith is therefore being excluded from the practice of law in the District Court on an impermissible basis, i.e., on the basis of his financial inability to pay more than $50,000.00 in harsh and unjustified sanctions.

conference in this case will be set shortly after new counsel enters on behalf of plaintiff." (R. Vol. I., Doc. 48, all pages and lines.) This amended minute order was not mailed to Mr. Smith, who learned of its contents from the plaintiff.

On September 7, 1995, Judge Weinshienk issued her order granting defendants' application for attorney fees and imposing attorney fee sanctions of $8,640.00 against Mr. Smith exclusively for filing and pursuing an immediate appeal of her order of June 17, 1994 staying plaintiff's federal civil rights case "until final action is taken on the Committee on Conduct's recommendation concerning plaintiff's counsel's status," and vacating the jury trial scheduled to commence on August 1, 1994. (R. Vol. I., Doc. 51, all pages and lines.) Judge Weinshienk treated plaintiff's and Mr. Smith's motion to clarify status of legal representation, and notice of plaintiff's inability to comply with the (July 21, 1995) amended minute order as a pro se motion for extension of time to secure new counsel, and granted the motion to September 22, 1995. (Id.) Judge Weinshienk announced that "[p]laintiff will be presumed to be handling this case

pro se until new counsel enters an appearance," and that "this Court will no longer accept any papers which have been signed by Mr. Smith." (Id.) Judge Weinshienk refused to rule on plaintiff's and Mr. Smith's request for proper notice, an opportunity to file a brief and a hearing after the Tenth Circuit had disposed of their appeal in this case (including their petition for rehearing and suggestion for rehearing en banc), and had issued its mandate pursuant to Fed. R. App. P. 41(a). (Id.)

On October 6, 1995, United States District Judge Wiley Y. Daniel issued his order announcing that "[b]ased on the Court's review of the entire file, including the Court's May 15, 1995 Order indicating that David L. Smith is no longer authorized to practice law before this Court, Plaintiff's Motion to Permit Mr. Smith to Continue to Represent Ms. Howard on a Hardship Basis is DENIED." (R. Vol. I., Doc. 56, all pages and lines.) In addition to denying Plaintiff's Motion to Permit Mr. Smith to Continue to Represent Ms. Howard on a Hardship Basis, Judge Daniel filed a complaint against Mr. Smith with the District Court Committee on Conduct alleging that due to the fact that

footnote 2 of plaintiff's motion states that "this motion was prepared by Ms. Howard with the assistance of Mr. Smith," Mr. Smith "apparently" represented Ms. Howard "notwithstanding the fact that he is unauthorized to practice law before this Court."[16] On this basis, Judge Daniel alleged that "David L. Smith may have acted in an unprofessional, unethical, or otherwise improper manner."[17] In an order issued on May 2, 1995, the District Court disciplinary panel (including Judge Weinshienk) "strongly admonished" Mr. Smith that "he shall not practice law in this District whether in a case filed in the Court or removed from state to federal court," and warned him "that if he continues to practice law in this District, he may be cited for contempt of Court in an appropriate proceeding." This order was issued on the basis of Judge Daniel's unsubstantiated complaint against Mr.



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[16]Mr. Smith denies that he represented Ms. Howard "notwithstanding the fact that he is unauthorized to practice law before this court."

[17]Mr. Smith denies that he "acted in an unprofessional, unethical, or otherwise improper manner."

Smith, without holding a hearing at which he would have the opportunity to present evidence in defense and mitigation, in violation of his Fifth Amendment right to due process of law.

On January 22, 1996, Judge Daniel issued his order denying plaintiff's motion to stay the proceedings in the District Court pending her appeal of Judge Weinshienk's order of September 7, 1995. (R. Vol. I., Doc. 62, all pages and lines.) This order was issued despite the fact that the Tenth Circuit had exclusive jurisdiction over the case.

On August 4, 1997 and August 11, 1997, Judge Daniel issued his orders dismissing plaintiff's federal civil rights case with prejudice, each party to bear her or its own costs and attorney fees. (R. Vol. I., Docs. 121 and 123, all pages and lines.) These orders were issued without awarding the attorney fees required by 42 U.S.C. § 1988.

## IV. ARGUMENT

In Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996), the Tenth Circuit said:

We will dismiss an appeal as moot if it is impossible for this court to grant the appellant any effectual relief whatsoever. In re Material Witness Warrant Nichols, 77 F.3d 1277, 1279 (10th Cir. 1996).

We held in G.J.B. & Assocs., Inc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990), that a sanctions order against an attorney currently of record is not immediately appealable as a final judgment where the underlying controversy is unresolved. Further, such an order is not appealable under the collateral order exception to the final judgment rule because it could be appealed by the attorney at the conclusion of the underlying case, even if the parties settle or elect not to appeal. Id. at 827-29.

In United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992), we addressed whether an attorney who no longer was involved in the underlying action because his pro hac vice status had been revoked could take an immediate appeal from the revocation order, even though the underlying case had not been

concluded. We held the attorney could not because the order was not a final judgment. Id. at 448. Further, because the attorney was seeking an appeal only to vindicate his reputation, rather than to be allowed to continue representing his client, we saw no reason why the order could not effectively be reviewed on appeal from the final judgment. Id. at 451. Even the former client's acquittal would not render the revocation order unreviewable at the conclusion of the case. Id. Thus, the order was not appealable under the collateral order exception to the final judgment rule. Id.

These cases establish that settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation.[18] We therefore conclude the appeal is not

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[18]An attorney would lack standing to challenge the order insofar as it affected only his or her client's rights. Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 854 (10th Cir. 1993).

> moot insofar as the district court's order found that Attorney Greer had violated the Colorado Rules of Professional Conduct. See Kirkland v. National Mortgage Network, Inc., 884 F.2d 1367, 1370 (11th Cir. 1989) (holding challenge to order disqualifying attorney was not moot, despite dismissal of underlying case, where order's 'brand of disqualification' on grounds of dishonesty and bad faith could hang over attorney's name and career for years). That the underlying cases were dismissed pursuant to a stipulation for dismissal with prejudice has no effect on the attorneys' right to appeal because they were not parties to the stipulation. Cf. Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 526 (10th Cir. 1992).

See id. at 492-93. By issuing their orders of June 17, 1994, May 15, 1995, July 21, 1995, September 7, 1995, October 6, 1995, January 22, 1996, August 4, 1997 and August 11, 1997, Judges Weinshienk and Daniel disqualified Mr. Smith from further representation of the plaintiff for allegedly violating the Colorado

Rules of Professional Conduct. Since these orders rested on grounds that could (and did) harm Mr. Smith's professional reputation,[19] settlement of the underlying case did not preclude appellate review of these orders, which exceeded the scope of the District Court disciplinary panel's disciplinary order of February 10, 1995.

By issuing their orders disqualifying Mr. Smith from representing his client in accordance with the terms of their contingent fee agreement, Judges Weinshienk and Daniel deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living. See Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694,



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[19]See Howard v. Mail-Well Envelope Company, et al., 90 F.3d 433 (10th Cir.), cert. denied, ____ U.S. ____, 117 S.Ct. 484, 136 L.Ed.2d 378 (1996); see also Howard v. Mail-Well Envelope Company, et al., 164 F.R.D. 524 (D. Colo. 1996). As the direct and proximate result of these officially reported opinions, Mr. Smith has suffered irreparable harm to his personal and professional reputations.

33 L.Ed.2d 570 (1972); Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Since these orders were issued without affording Mr. Smith proper notice, or an opportunity to file a brief or otherwise be heard before entry of a final judgment, Judges Weinshienk and Daniel deprived him of his Fifth Amendment right to due process of law. See id.; see also In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Razotos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States

District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990).

This disqualification of counsel also deprived the plaintiff, who was financially unable to hire substitute counsel, and was incompetent to proceed pro se, of her First Amendment right to pursue federal civil rights litigation. See NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("[a]nd under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); United Mine Workers v. Illinois, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); Sure-Tan, Inc. v.

NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("[a] public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Henriksen v. Bentley, 644 F.2d 852, 855 (10th Cir. 1981); Shaw v. Neece, 727 F.2d 947, 948 (10th Cir. 1984); McKay v. Hammock, 730 F.2d 1367, 1375 (10th Cir. 1984); Nordgren v. Milliken, 762 F.2d 851 (10th Cir. 1985); Ward v. Fort, 762 F.2d 856, 858 (10th Cir. 1985). As the direct and proximate result of this constitutional deprivation, the plaintiff was forced to forego her Seventh Amendment right to a jury trial and settle her case at beneath nuisance value.

An attorney has standing to appeal the denial of attorney fees. See Dietrich Corp. v. King Resources Co., 596 F.2d 422 (10th Cir. 1979); Lipscomb v. Wise, 643 F.2d 319, 320-21 (5th Cir. 1981); Samuels v. American Motors Sales Corp., 969 F.2d 573, 576 (7th Cir. 1992); U.S. Tippett, 975 F.2d 713, 718 (10th Cir. 1992) (a nonparty witness has standing to appeal denial of an application for statutory witness fees, just as an attorney has standing to appeal the denial of attorney fees). By issuing his orders of August 4, 1997 and August 11, 1997, dismissing plaintiff's federal civil rights case with prejudice, each party to bear her or its own costs and attorney fees, Judge Daniel denied the attorney fees he was required to award pursuant to 42 U.S.C. § 1988. Therefore, since these orders deprived Mr. Smith of his property interests created by his contingent fee agreement with the plaintiff, he has standing to seek appellate review of these orders.

In her order of September 7, 1995, Judge Weinshienk granted defendants' application for attorney fees and imposed attorney fee sanctions of $8,640.00 against Mr. Smith exclusively for filing and pursuing an immediate appeal of her

order of June 17, 1995 staying plaintiff's federal civil rights case "until final action is taken on the Committee on Conduct's recommendation concerning plaintiff's counsel's status," and vacating the jury trial scheduled to commence on August 1, 1994. As the purported basis for her order, Judge Weinshienk stated that "[n]o objections were filed to defendants' application" and "[t]he Court has reviewed defendants' application and supporting documentation and finds the request reasonable," citing Ramos v. Lamm, 713 F.2d 546, 552 (10th Cir. 1983). However, this perfunctory statement is clearly insufficient as a meaningful judicial decision under Article III of the Constitution of the United States. This statement is also insufficient to give proper notice as to whether the standards for imposing sanctions set forth in Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) have been followed for purposes of review on appeal. As is clear from the record, Mr. Smith's conduct in filing an immediate appeal of Judge Weinshienk's order of June 17, 1994 manifested neither an intentional nor a reckless disregard of his duties to the Court. See id. Mr. Smith's appeal presented colorable claims based on the facts and law at issue, as

required by White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990). Judge Weinshienk imposed harsh and unjustified sanctions of $8,640.00 against Mr. Smith for the improper purpose of driving him out of federal civil rights practice and chilling (or freezing) federal civil rights litigation in general. See id. By refusing to rule on plaintiff's and Mr. Smith's request for proper notice, an opportunity to file a brief and a hearing after the Tenth Circuit had disposed of their appeal in this case (including their petition for rehearing and suggestion for rehearing en banc), and had issued its mandate pursuant to Fed. R. App. P. 41(a), Judge Weinshienk deprived them of their Fifth Amendment right to due process of law. Under these circumstances, Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice.

The filing of a timely and sufficient notice of appeal immediately transfers jurisdiction of all matters relating to the appeal from the district court to the court of appeals, and divests the district court of authority to proceed further with respect to such

matters, except in aid of jurisdiction. See Petuskey v. Rampton, 431 F.2d 378 (10th Cir. 1970), cert. denied, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971). When Judges Weinshienk and Daniel issued their orders of May 15, 1995, July 21, 1995, September 7, 1995, October 6, 1995, and January 22, 1996, this case was still on appeal to the Tenth Circuit, which had exclusive jurisdiction over the case. Judges Weinshienk and Daniel were therefore proceeding without or in excess of their jurisdiction.

Under all the circumstances, it was reasonably questionable whether Judges Weinshienk and Daniel could be fair and impartial decisionmakers in this case, or in any case involving Mr. Smith. Judges Weinshienk and Daniel were therefore obligated by 28 U.S.C. § 455(a) and Canon 3 of the ABA Code of Judicial Conduct to disqualify themselves from this case. See Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). By failing or refusing to disqualify themselves from this case, Judges Weinshienk and Daniel deprived Mr. Smith of his Fifth Amendment due process right to a fair and impartial decisionmaker. See Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40

L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decisionmaker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed.2d 11 (1954) (nor may a judge or other ostensibly impartial decisionmaker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). Judges Weinshienk and Daniel also engaged in a pattern of judicial misconduct, in violation of 28 U.S.C. § 372(c).

## V. CONCLUSION

Reversal of Judges Weinshienk's and Daniel's orders of June 17, 1994, May 15, 1995, July 21, 1995, September 7, 1995, October 6, 1995, January 22, 1996, August 4, 1997 and August 11, 1997 is requested, as well as such other and further relief as may be just under the circumstances,

including a full investigation of the charges made against Judges Weinshienk and Daniel in this brief.

## VI. REQUEST FOR ORAL ARGUMENT

Oral argument is requested to address the important issues of first impression raised by this appeal.

Dated this 2nd day of January, 1998.

Respectfully submitted,

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PRO SE ATTORNEY-APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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JAMES EDWARD QUALLS,

Plaintiff,

v.

No. 97-1392
(D.C. No. 91-Z-989)
(Dist. of Colo.)

REGIONAL TRANSPORTATION DISTRICT, RICHARD BAUMAN, ROBERT GARSIDE, RICHARD REYNOLDS, ELLSWORTH WALKER, and JAMES MISEK,

Defendants-Appellees.

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DAVID L. SMITH,

Attorney-Appellant.

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# OPENING BRIEF FOR PRO SE ATTORNEY-APPELLANT DAVID L. SMITH

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Pro se attorney-appellant David L. Smith ("Mr. Smith") hereby files his opening brief:

## I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction of the United States District Court for the District of Colorado is based on Fed. R. Civ. P. 60(b).

Appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit is based on 28 U.S.C. § 1291.

## II. ISSUES PRESENTED FOR REVIEW

Whether by issuing her (October 8, 1997) Minute Order denying Mr. Smith's (September 26, 1997) Motion Pursuant to Fed. R. Civ. P. 60(b) for Relief From Judgments, Orders and/or Proceedings, and Motion to Take Depositions and Conduct Other Discovery, Judge Weinshienk deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living.

Whether since this Minute Order was issued without affording Mr. Smith proper notice or an opportunity to file a brief or otherwise be heard before entry of a final judgment, without considering the claims, issues and arguments raised by him in his motions, and without giving any reasons for her decision, Judge Weinshienk deprived him of his Fifth Amendment right to due process of law.

Whether Judge Weinshienk also deprived Mr. Smith of his First Amendment right to petition the government for a redress of grievances.

Whether since it was reasonably questionable whether Judge Weinshienk could be a fair and impartial decisionmaker in this case, or in any case involving Mr. Smith, she was obligated to disqualify herself from this case pursuant to 28 U.S.C. § 455(a).

Whether by failing or refusing to disqualify herself from this case, Judge Weinshienk deprived Mr. Smith of his Fifth Amendment due process right to a fair and impartial decisionmaker.

Whether under all the circumstances, Judge Weinshienk engaged in a pattern of judicial misconduct, in violation of 28 U.S.C. § 372(c) and Canon 3 of the ABA Code of Judicial Conduct.

## III. STATEMENT OF THE CASE

On December 10, 1992, United States District Judge Zita L. Weinshienk issued her order severely attacking, reprimanding and warning Mr. Smith for seeking dismissal with prejudice of plaintiff's remaining Title VII claim so that an appeal of his improperly dismissed claims under 42 U.S.C. §§ 1981, 1983, 1985(3) and 1986 could be taken to the United States Court of Appeals for the Tenth Circuit. (R. Vol. I., Doc. 272, page 1.) Judge Weinshienk's unsubstantiated attacks on Mr. Smith's professional character, judgment and reputation improperly interfered with his relationship with his client, who chose to ignore his attorney's advice and to continue with his remaining Title VII claim in the United States District Court for the District of Colorado. (R. Vol. I., Doc. 272, pages 1-2.) Since Judge Weinshienk's order was issued without affording Mr. Smith proper notice of her contemplated actions or an opportunity to

file a brief or otherwise be heard before entry of a final judgment, he was deprived of his Fifth Amendment right to due process of law. (R. Vol. I., Doc. 272, page 2.)

On February 16, 1994, Judge Weinshienk issued her order completely reversing her (January 25, 1994) ruling that "the case will continue with Mr. Smith representing the plaintiff until such time as there is a ruling by this court that he may not appear"; granting defendant Regional Transportation District's (February 4, 1994) motion to stay the proceedings and to vacate the trial scheduled to commence on April 25, 1994; and staying plaintiff's federal civil rights case "pending the Committee on Conduct's determination of plaintiff's counsel's status." (R. Vol. I., Doc. 272, page 2.) This order was based on a constitutionally defective or otherwise unlawful disciplinary order or opinion issued against Mr. Smith by the Committee on Conduct of the United States District Court for the District of Colorado. (R. Vol. I., Doc. 272, page 2.)

On June 17, 1994, Judge Weinshienk issued her order staying plaintiff's civil rights case for a second time



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"until final action is taken by the District Court on the Committee on Conduct's recommendation concerning plaintiff's counsel's status." (R. Vol. I., Doc. 272, page 2.) This order was based on a constitutionally defective or otherwise unlawful disciplinary order or opinion issued against Mr. Smith by the Committee on Conduct of the United States District Court for the District of Colorado. (R. Vol. I., Doc. 272, pages 1-2.)

By issuing her (May 15, 1995) orders removing Mr. Smith as plaintiff's attorney and lifting the stay in plaintiff's federal civil rights case, Judge Weinshienk acted beyond the scope of the constitutionally defective or otherwise unlawful disciplinary order issued against Mr. Smith by the three-judge (including Judge Weinshienk) disciplinary panel of the United States District Court for the District of Colorado on February 10, 1995. (R. Vol. I., Doc. 272, page 3.) This disciplinary order did not permit removal of Mr. Smith as attorney for his clients in pending civil rights litigation. (R. Vol. I., Doc. 272, page 3.) Further, plaintiff and Mr. Smith were deprived of their Fifth Amendment right to due process of

law by Judge Weinshienk's refusal to allow Mr. Smith to argue on their behalf before issuing her (May 15, 1995) orders, which were issued without giving them prior notice of the contemplated removal of Mr. Smith as plaintiff's attorney, and without affording them an opportunity to file a brief or otherwise be heard before entry of a final judgment. (R. Vol. I., Doc. 272, page 3.)

Under all the circumstances, Judge Weinshienk's impartiality might reasonably be questioned. (R. Vol. I., Doc. 272, page 3.) Judge Weinshienk was therefore obligated to disqualify herself from plaintiff's federal civil rights case pursuant to 28 U.S.C. § 455(a) and Canon 3 of the ABA Code of Judicial Conduct. (R. Vol. I., Doc. 272, page 3.) By issuing her (June 16, 1995) order refusing to disqualify herself from plaintiff's federal civil rights case, Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice. (R. Vol. I., Doc. 272, pages 3-4.) Judge Weinshienk also engaged in a pattern of judicial misconduct, in violation of 28 U.S.C. § 372(c). (R. Vol. I., Doc. 272, page 4.)

By issuing her (July 31, 1995) order denying plaintiff's and Mr. Smith's motion for reconsideration of United States Magistrate Judge Donald E. Abram's (January 28, 1994) order imposing harsh and unjustified sanctions of $8,187.50 against Mr. Smith for filing alleged "frivolous" discovery motions, and requiring him to pay this amount to defendant Regional Transportation District ("RTD") by no later than February 28, 1994, Judge Weinshienk again grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice. (R. Vol. I., Doc. 272, page 4.) Mr. Smith did not file any "frivolous" discovery motions in this case. (R. Vol. I., Doc. 272, page 4.) Magistrate Judge Abram imposed harsh and unjustified sanctions of $8,187.50 against Mr. Smith for the improper purpose of driving him out of federal civil rights practice and chilling (or freezing) civil rights litigation in general. (R. Vol. I., Doc. 272, page 4.)

On August 10, 1995, Judge Weinshienk held an in-chambers status conference, at which she granted defendants' motion for attorney fees; determined that the reasonable amount of attorney fees for

filing the appeal of her (June 17, 1994) order to the United States Court of Appeals for the Tenth Circuit was $1,187.50; and ordered Mr. Smith (but not plaintiff) to pay this amount to defendants pursuant to the order issued by the three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit on July 18, 1995. (R. Vol. I., Doc. 272, page 4.) Judge Weinshienk announced these orders without giving Mr. Smith prior notice of her contemplated actions or an opportunity to file a brief or otherwise be heard before entry of a final judgment, thus depriving him of his Fifth Amendment right to due process of law. (R. Vol. I., Doc. 272, pages 4-5.)

When Judge Weinshienk issued or announced her (May 15, 1995, June 16, 1995, July 31, 1995 and August 10, 1995) orders, plaintiff's federal civil rights case was already on appeal to the United States Court of Appeals for the Tenth Circuit, which had exclusive jurisdiction over the case. (R. Vol. I., Doc. 272, page 5.) Judge Weinshienk was therefore proceeding without or in excess of her jurisdiction when she issued or announced

her (May 15, 1995, June 16, 1995, July 31, 1995 and August 10, 1995) orders. (R. Vol. I., Doc. 272, page 5.)

In their (September 29, 1995) Stipulation of Dismissal With Prejudice, plaintiff and defendant RTD alleged that "[t]he parties have reached full and final settlement of all claims in this proceeding," and purported to stipulate to dismiss plaintiff's federal civil rights action with prejudice, "with each party to bear its own attorney fees, expenses and costs." (R. Vol. I., Doc. 272, page 5.) However, Mr. Smith, who had been forced to proceed pro se in this case because of the disciplinary orders or opinions improperly suspending him from the practice of law in the United States District Court for the District of Colorado, and removing him as plaintiff's counsel of record, did not sign this stipulation, as required by Fed. R. Civ. P. 41(a)(1)(ii). (R. Vol. I., Doc. 272, page 5.) Further, there was a significant discrepancy between this stipulation and the (September 29, 1995) Settlement Agreement and Full and Final Release, in which plaintiff and defendant RTD agreed that defendant RTD reserved its rights, if any, to obtain recovery of attorney fees, costs or other sanctions

imposed against Mr. Smith. (R. Vol. I., Doc. 272, pages 5-6.) Presumably, this reservation included the harsh and unjustified sanctions of $8,187.50 imposed against Mr. Smith on July 31, 1995, and those of $1,187.50 imposed against him on August 10, 1995. (R. Vol. I., Doc. 272, page 6.) This significant discrepancy between the (September 29, 1995) Stipulation of Dismissal With Prejudice and the (September 29, 1995) Settlement Agreement and Full and Final Release constituted an intentional fraud on Mr. Smith and/or Judge Weinshienk, who issued her (October 10, 1995) Order of Dismissal based on the (September 29, 1995) stipulation. (R. Vol. I., Doc. 272, page 6.)

In her (October 10, 1995) Order of Dismissal, Judge Weinshienk dismissed plaintiff's federal civil rights case with prejudice, "the parties to pay their own attorney's fees, expenses and costs." (R. Vol. I., Doc. 272, page 6.) Judge Weinshienk issued her (October 10, 1995) Order of Dismissal based on the (September 29, 1995) Stipulation of Dismissal With Prejudice. (R. Vol. I., Doc. 272, page 6.) However, because Mr. Smith did not sign this stipulation, as required by Fed. R. Civ. P. 41(a)(1)(ii),

and because of the intentional fraud on Mr. Smith and/or Judge Weinshienk described in the preceding paragraph, Judge Weinshienk's (October 10, 1995) Order of Dismissal was null and void ab initio. (R. Vol. I., Doc. 272, page 6.) Finally, by issuing her (October 10, 1995) Order of Dismissal without awarding the attorney fees required by 42 U.S.C. § 1988, Judge Weinshienk deprived Mr. Smith of his property interests created by his contingent fee agreement with plaintiff, in violation of his Fifth Amendment right to due process of law. (R. Vol. I., Doc. 272, pages 6-7.)

On November 21, 1995, Judge Weinshienk issued her Minute Order announcing that "Mr. Smith was never made a party to this case by the Court," and on this alleged basis, returned to Mr. Smith his (October 10, 1995) Motion to Reopen the Time for Appeal of Order Issued by United States District Judge Zita L. Weinshienk on August 10, 1995, and for Notice of Any Order Dismissing the Case; his (October 11, 1995) Motion to Alter or Amend Judgment; his (November 15, 1995) Motion for Relief From Judgments, Orders and/or Proceedings; and his (November 17, 1995) Motion for Leave to Take Depositions and Conduct Other

Discovery. (R. Vol. I., Doc. 258, all pages and lines.) However, Mr. Smith had been proceeding pro se in this case since at least May 15, 1995, when Judge Weinshienk issued her orders removing him as plaintiff's attorney and lifting the stay in plaintiff's civil rights case. These orders, as well as the other judgments, orders and/or proceedings in this case, conferred Article III standing on Mr. Smith to proceed pro se and/or as a non-party attorney entitled to file the motions returned to him by Judge Weinshienk on November 21, 1995. By returning Mr. Smith's motions to him on the alleged basis that "Mr. Smith was never made a party to this case by the Court," Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice. Judge Weinshienk also engaged in a pattern of judicial misconduct, in violation of 28 U.S.C. § 372(c).

On October 8, 1997, Judge Weinshienk issued her Minute Order denying Mr. Smith's (September 26, 1997) Motion Pursuant to Fed. R. Civ. P. 60(b) for Relief From Judgments, Orders and/or Proceedings, and Motion to Take Depositions and Conduct Other Discovery,

without affording him proper notice or an opportunity to file a brief or otherwise be heard before entry of a final judgment, without considering the claims, issues and arguments raised by him in his motions, and without giving any reasons for her decision. (R. Vol. I., Doc. 275, all pages and lines.)

## IV. ARGUMENT

Fed. R. Civ. P. 60(b) provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior

judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

By issuing her (October 8, 1997) Minute Order denying Mr. Smith's (September 26, 1997) Motion Pursuant to Fed. R. Civ. P. 60(b) for Relief From Judgments, Orders and/or Proceedings, and Motion to Take Depositions and Conduct Other Discovery, Judge Weinshienk deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living. See Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 331 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Johnson v. Board of County Commissioners, 85 F.2d 489, 492-93 (10th Cir. 1996) ("[t]hese cases establish that settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation"), citing In re Material Witness Warrant Nichols, 77

F.3d 1277, 1279 (10th Cir. 1996), G.J.B. & Assocs., Inc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990), United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992), Urselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 854 (10th Cir. 1993), Kirkland v. National Mortgage Network, Inc., 884 F.2d 1367, 1370 (11th Cir. 1989), and Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 526 (10th Cir. 1992); Dietrich Corp. v. King Resources Co., 596 F.2d 422 (10th Cir. 1979) (an attorney has standing to appeal the denial of attorney fees); Lipscomb v. Wise, 643 F.2d 319, 320-321 (5th Cir. 1981) (same); Samuels v. American Motors Sales Corp., 969 F.2d 573, 576 (7th Cir. 1992) (same); U.S. v. Tippett, 975 F.2d 713, 718 (10th Cir. 1992) (a nonparty witness has standing to appeal denial of an application for statutory witness fees, just as an attorney has standing to appeal the denial of attorney fees). Since this Minute Order was issued without affording Mr. Smith proper notice or an opportunity to file a brief or otherwise be heard before entry of a final judgment, without considering the claims, issues and arguments raised by him in his motions, and without giving any reasons for her decision, Judge Weinshienk deprived him of his Fifth

Amendment right to due process of law. See id.; see also In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990). Judge Weinshienk also deprived Mr. Smith of his First Amendment right to petition the government for a redress of grievances. See NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("[a]nd under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); United Mine Workers v. Illinois, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339

(1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("[a] public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Henriksen v. Bentley, 644 F.2d 852, 855 (10th Cir. 1981); Shaw v. Neece, 727 F.2d 947, 948 (10th Cir. 1984); McKay v. Hammock, 730 F.2d 1367, 1375 (10th Cir. 1984); Nordgren v. Milliken, 762 F.2d 851 (10th Cir. 1985); Ward v. Fort, 762 F.2d 856, 858 (10th Cir. 1985). Further, since it was reasonably questionable whether Judge Weinshienk could be a fair and impartial decisionmaker in this case,

or in any case involving Mr. Smith, she was obligated to disqualify herself from this case pursuant to 28 U.S.C. § 455(a). See Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). By failing or refusing to disqualify herself from this case, Judge Weinshienk deprived Mr. Smith of his Fifth Amendment due process right to a fair and impartial decisionmaker. See Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decisionmaker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed.2d 11 (1954) (nor may a judge or other ostensibly impartial decisionmaker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). Finally, under all the circumstances, Judge Weinshienk engaged

in a pattern of judicial misconduct, in violation of 28 U.S.C. § 372(c) and Canon 3 of the ABA Code of Judicial Conduct.

## V. CONCLUSION

Reversal of Judge Weinshienk's (October 8, 1997) Minute Order is requested, as well as such other and further relief as may be just under the circumstances, including a full investigation of the charges made against Judge Weinshienk in this brief.

## VI. REQUEST FOR ORAL ARGUMENT

Oral argument is requested to address the important issues of first impression raised by this appeal.

Dated this 28th day of November, 1997.

Respectfully submitted,

DAVID L. SMITH

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Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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LINDA C. HOWARD,

Plaintiff,

v. No. 97-1297

MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Defendants-Appellees.

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DAVID L. SMITH,

Attorney-Appellant.

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JAMES EDWARD QUALLS,

Plaintiff,

v. No. 97-1392

REGIONAL TRANSPORTATION DISTRICT; RICHARD BAUMAN; ROBERT GARSIDE; RICHARD REYNOLDS; ELLSWORTH WALKER; and JAMES MISEK,

Defendants-Appellees.

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DAVID L. SMITH,

Attorney-Appellant.

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**PETITION FOR REHEARING, SUGGESTION FOR REHEARING EN BANC, AND OBJECTIONS TO PROSPECTIVE FILING RESTRICTIONS AND INJUNCTION**

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In its (June 29, 1998) opinion, a copy of which is attached hereto as Exhibit 1, this court charges that by filing and pursuing these appeals, Mr. Smith is attempting to re-litigate issues already determined by this court or foreclosed by previous determinations of this court, in violation of orders issued by this court in previous cases. However, the issues raised and argued by Mr. Smith in these previous cases were different from those raised and argued by

him in the present cases. The parties were also different. In two of these previous cases, the burden of proof was different. In all of these previous cases, this court refused to address the issues raised and argued by Mr. Smith--a blatant and egregious violation of his First Amendment right to access to the courts to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision pursuant to 28 U.S.C. § 1291. See Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); Salve Regina College v. Russell, 499 U.S. 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("the obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations"); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); United States v. Jose, 519 U.S. 54, 117 S.Ct. 463, 136 L.Ed.2d 364 (1996) ("finality, not ripeness, is the doctrine governing appeals from District Court to Circuit Court"); Brewen v. United States, 375 F.2d 285 (5th Cir. 1967); Matter of

McLinn, 739 F.2d 1395 (9th Cir. 1984) ("every party is entitled to a full, considered, and impartial review of the decision of the trial court"); Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3rd Cir. 1988); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Steiner Corp. v. Johnson & Higgins of California, 135 F.3d 684 (10th Cir. 1997). Nor did this court give any independent reasons for its decisions. See id. This court merely affirmed the orders issued by the district court, which also refused to address the issues raised and argued by Mr. Smith--another blatant and egregious violation of his First and Fifth Amendment rights. See id.; see also NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Logan v.

Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("a public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Razotos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Collie v. Vought Aircraft Company, U.S. App. LEXIS 9479 (5th Cir.

May 12, 1998), a copy of which is attached hereto as Exhibit 2. Therefore, by filing and pursuing these appeals, Mr. Smith is not attempting to re-litigate issues that have already been determined by this court or foreclosed by previous determinations of this court, in violation of orders issued by this court in previous cases.[20] Instead, Mr. Smith is attempting to litigate meritorious issues that this court and the district court have steadfastly refused to decide on their merits.[21] Further, since this

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[20]In other words, Mr. Smith is not attempting to litigate issues barred by the doctrines of res judicata and collateral estoppel, which have no application where, as in the present cases, the appellant did not have a full and fair opportunity to litigate his federal claims. See Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

[21]Since the issues Mr. Smith is attempting to litigate are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, or to establish new law, this court's charge that these issues are "frivolous" is clearly false. See McKnight v. General Motors Corporation, 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d

court is charging Mr. Smith with violating this court's previous orders, it is charging him with what amounts to criminal contempt; and he is therefore entitled to a full criminal process, including his Sixth Amendment right to a trial by jury on these charges.[22] See



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655 (1994) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's attorney was that his argument was foreclosed by circuit precedent).

[22]As a matter of the equal protection of the laws, Mr. Smith should not have fewer constitutional rights merely because he is being charged sua sponte by this court rather than in an order to show cause why he should not be held in contempt for allegedly violating this court's orders. See Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); Bodie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed.2d 797 (1911); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (attorney disciplinary proceedings are quasi-criminal in nature); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). At the very least, Mr. Smith is entitled to an evidentiary hearing at which he would have the opportunity to present expert testimony and other relevant evidence on his affirmative defenses and mitigating circumstances to the charges being brought against him, including evidence of his financial inability to pay the harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by this court and the district court.[23] See Burkett v.

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[23]Mr. Smith has a current negative net worth of more than $400,000.00. Due to his disbarment from the practice of law in this court and the district court, and his indefinite suspension from the practice of law in these courts and the courts of the State of Colorado, Mr. Smith has no income from which his negative net worth could be reduced, or from which the harsh and unjustified sanctions of more than $50,000.00 imposed against him by this court and the

Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Collie v. Vought Aircraft Company, U.S. App. LEXIS 9479 (5th Cir. May 12, 1998). Mr. Smith hereby specifically requests an evidentiary hearing on these matters if this court denies his request for a trial by jury. However, since this court is incapable of rendering a fair and impartial decision



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district court could be paid. See Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948) (impossibility of performance constitutes a defense to contempt); United States v. Rylander, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983) (the court must consider present inability to comply with the order in question); Tinsley v. Mitchell, 804 F.2d 1254, 1256 (D.C. Cir. 1986) (citing Maggio v. Zeitz).

with respect to any matter involving Mr. Smith, he requests that these matters be transferred to the United States Court of Appeals for the Federal Circuit for decision.[24] See 28 U.S.C. § 455(a); Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decision-maker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decision-maker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99



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[24]Mr. Smith is a member in good standing of the bar of the Federal Circuit, and he believes that the judges of the Federal Circuit could and would render a fair and impartial decision in these matters.

L.Ed.2d 11 (1954) (nor may a judge or other ostensibly impartial decision-maker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). Mr. Smith requests such other and further relief as may be just under the circumstances, including an order dismissing with prejudice the clearly frivolous and groundless charges this court is bringing against him for the clearly improper purpose of depriving him of his First and Fifth Amendment rights to litigate meritorious issues that this court and the district court have steadfastly refused to decide on their merits.

Mr. Smith hereby specifically objects to this court's prospective filing restrictions and injunction, which would not only further violate his First Amendment right to access to the courts to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision pursuant to 28 U.S.C. § 1291. This court's prospective filing restrictions and injunction would also violate Mr. Smith's Sixth Amendment right to self-representation, including

his right to proceed pro se under 28 U.S.C. § 1654. See McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); Devine v. Indian River County School Board, 121 F.3d 576 (11th Cir. 1997). Further, the record is devoid of any evidence upon which this court could base imposing its prospective filing restrictions and injunction against Mr. Smith.

I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed.2d 797 (1911); Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed.2d 11 (1954); Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477,

20 L.Ed.2d 522 (1968); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); United States v. Rylander, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983); McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Salve Regina College v. Russell, 499 U.S. 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991); Liteky v. United

States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); McKnight v. General Motors Corporation, 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); United States v. Jose, 519 U.S. 54, 117 S.Ct. 463, 136 L.Ed.2d 364 (1996); Harbolt v. Allredge, 464 F.2d 1243 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972); Evans v. Moseley, 455 F.2d 1084 (10th Cir. 1972); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir.

1996); Steiner Corp. v. Johnson & Higgins of California, 135 F.3d 684 (10th Cir. 1997).

I express a belief based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance: (1) whether by filing and pursuing these appeals, Mr. Smith is attempting to re-litigate issues already determined by this court or foreclosed by previous determinations of this court, in violation of orders issued by this court in previous cases; (2) whether the issues raised and argued by Mr. Smith in these previous cases were different from those raised and argued by him in the present cases; (3) whether the parties were also different; (4) whether in two of these previous cases, the burden of proof was different; (5) whether in all of these previous cases, this court refused to address the issues raised and argued by Mr. Smith--a blatant and egregious violation of his First Amendment right to access to the courts to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of

that decision pursuant to 28 U.S.C. § 1291; (6) whether this court gave any independent reasons for its decisions; (7) whether this court merely affirmed the orders issued by the district court, which also refused to address the issues raised and argued by Mr. Smith--another blatant and egregious violation of his First and Fifth Amendment rights; (8) whether Mr. Smith is attempting to litigate issues barred by the doctrines of res judicata and collateral estoppel, which have no application where, as in the present cases, the appellant did not have a full and fair opportunity to litigate his federal claims; (9) whether Mr. Smith is attempting to litigate meritorious issues that this court and the district court have steadfastly refused to decide on their merits; (10) whether since the issues Mr. Smith is attempting to litigate are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, or to establish new law, this court's charge that these issues are "frivolous" is clearly false; (11) whether since this court is charging Mr. Smith with violating this court's previous orders, it is charging him with what amounts to criminal contempt; and he

is therefore entitled to a full criminal process, including his Sixth Amendment right to a trial by jury on the charges being brought against him; (12) whether as a matter of the equal protection of the laws, Mr. Smith should not have fewer constitutional rights merely because he is being charged sua sponte by this court rather than in an order to show cause why he should not be held in contempt for allegedly violating this court's orders; (13) whether at the very least, Mr. Smith is entitled to an evidentiary hearing at which he would have the opportunity to present expert testimony and other relevant evidence on his affirmative defenses and mitigating circumstances to the charges being brought against him, including evidence of his financial inability to pay the harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by this court and the district court; (14) whether due to his disbarment from the practice of law in this court and the district court, and his indefinite suspension from the practice of law in these courts and the courts of the State of Colorado, Mr. Smith has no income from which his negative net worth could be reduced, or from which the harsh and unjustified sanctions of more than

$50,000.00 imposed against him by this court and the district court could be paid; (15) whether since this court is incapable of rendering a fair and impartial decision with respect to any matter involving Mr. Smith, he is entitled to have these matters transferred to the United States Court of Appeals for the Federal Circuit for decision; (16) whether this court's prospective filing restrictions and injunction would further violate Mr. Smith's First Amendment right to access to the courts to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision pursuant to 28 U.S.C. § 1291; (17) whether this court's prospective filing restrictions would also violate Mr. Smith's Sixth Amendment right to self-representation, including his right to proceed pro se under 28 U.S.C. § 1654; (18) whether the record is devoid of any evidence upon which this court could base imposing its prospective filing restrictions and injunction against Mr. Smith.

Dated this 6th day of July, 1998.

Respectfully submitted,

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